12

Office - Supreme Court, U. S.
FILED
AUG 27 1943
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 299

MARS, INCORPORATED,

Petitioner,

vs.

PRENTISS M. BROWN, Administrator, Office of Price Administration.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Claude R. Miller,
Chicago, Illinois;
Robert B. Holland,
Dallas, Texas;
Leo B. Parker,
Kansas City, Missouri;
Counsel for Petitioner.

Of Counsel:
Strasburger, Price, Holland,
Kelton & Miller.

INDEX.

Subject Index.

	Page
Petition for writ of certiorari	1
Opinions below	1
Jurisdiction	2
Statute and regulation involved	2
Questions presented	3
First question	4
Second question	6
Third question	7
Fourth question	9
Fifth question	11
Statement	16
Specification of errors to be urged	23
Reasons for granting the writ	26
Conclusion	27
Brief in support of petition	29
Opinions below	29
Jurisdiction	29
Statement of case (see petition)	30
Specification of errors	30
Summary of argument	33
Argument	35
Point One	35
Point Two	39
Point Three	42
Point Four	47
Point Five	55
Point Six	56
Point Seven	58
Point Eight	59
Point Nine	63
Conclusion	65

Table of Cases Cited.

Baird v. *St. Louis, I. M. & S. Ry. Co.*, 41 F. 592	51
Commercial Corporation v. *New York Barge Corp.*, 314 U. S. 104	40
Davis v. *Ill. Central Ry. Co.*, 16 I. C. C. 376	51
Davis v. *O'Hara*, 266 U. S. 314	42
Dubinsky v. *Lortz*, 129 F. (2d) 669	63

Page

Drybrough v. *Ware*, 111 F. (2d) 548 62
Foster v. *Special Site Sign Co.*, 85 F. (2d) 742 55
Georgia Rough & Cut Stone Co. v. *Georgia Ry. Co.*, 13 I. C. C. 401 51
Indemnity Insurance Co. v. *Moses*, 36 F. (2d) 219 63
Lillienthal v. *United States*, 97 U. S. 237 41
Omaha Hotel Co. v. *Wade*, 97 U. S. 13 42
Osage Oil and Refining Co. v. *Continental Oil Col*, 34 F. (2d) 585 62
Peck v. *Henrich*, 167 U. S. 624, 42 L. Ed. 302, 17 Sup. Ct. 927 55
Ramming Real Estate Co. v. *United States*, 122 F. (2d) 892 55
Reliance Life Ins. Co. v. *Burgess*, 112 F. (2d) 234 42
Southern Railway Co. v. *Montgomery*, 46 F. (2d) 990 ... 63
Twachtman v. *Connelly*, 106 F. (2d) 501 63
Van Huffel v. *Harkelrode*, 284 U. S. 225, 76 L. Ed. 256, 52 Sup. Ct. 115 55
Virginia Railroad Co. v. *Mullens*, 271 U. S. 220, 70 L. Ed. 915, 46 Sup. Ct. 526 55
Wesley Corporation, In re, 18 F. Supp. 347 63

STATUTES CITED.

Bill of Lading Act, Aug. 29, 1916, c. 415, Sec. 20, 39 Stat. 541 51
Emergency Price Control Act of 1942, Chapter 26, 56 Stat. 23, 50 U. S. C. A. App., Sec. 901 to 946 2,56
Judicial Code, Section 240(a) 2
General Maximum Price Regulation, 7 Fed. Reg. 3153. 2,21

OTHER AUTHORITIES CITED.

88th Cong. Rec. Jan. 8, 1942, p. 108 57
House Committee H. R. 5990, 77th Congress, 1st Session (1941) 56
H. R. 5990, 77th Congress, 2nd Session (Jan. 12, 1942) .. 56
Rules of Civil Procedure, Rule 52(a) 3
Senate Committee H. R. 5990, 77th Congress, 2nd Session (Jan. 2, 1942) 56
9 Pike & Fisher OPA Service 700: 128 57
IX Wigmore On Evidence, Third Edition:
Sec. 2485 41
Sec. 2487 41

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 299

MARS, INCORPORATED,

Petitioner,

vs.

PRENTISS M. BROWN, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Petitioner prays that a writ of certiorari be issued to review the judgment of the Circuit Court of Appeals for the Eighth Circuit reversing the judgment of the District Court and remanding the case with instructions to enter a decree of injunction against Petitioner.

Opinions Below.

The opinion of the District Court (R. 20) is reported in *49 Fed. Sup. 533.*

The opinion of the Circuit Court of Appeals (R. 647) is reported in *135 F. 2d 843.*

Jurisdiction.

The date of the judgment of the United States Circuit Court of Appeals is May 7, 1943 (R. 647). Petition for rehearing duly and timely filed by Petitioner in that court on May 15, 1943 (R. 673) was denied on May 27, 1943 (R. 687). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, and under Rule 38 of the Revised Rules of the Supreme Court of the United States.

Statute and Regulation Involved.

The Emergency Price Control Act of 1942, Chapter 26, 56 Stat. 23; 50 U. S. C. A. App., Sec. 901 to 946, inclusive, authorized the promulgation of regulations. Pursuant to this law, on April 28, 1942, the Administrator of the Office of Price Administration promulgated the General Maximum Price Regulation (hereinafter for the sake of convenience referred to as GMPR), (*7 Fed. Reg. 3153*).

Respondent based this suit upon the alleged violation by Petitioner of Sections 2 and 11 of General Maximum Price Regulation, the pertinent provisions of which are as follows:

> "Section 2 * * * Seller's maximum price for any commodity * * * shall be,
>
> (a) The highest price charged by the seller during March, 1942:
>
> (1) for the same commodity."
>
> "Section 11. Every person selling commodities * * * shall * * *
>
> (b) Prepare * * * a statement showing:
>
> (1) the highest price which he charged for such of those commodities * * * as he delivered * * * during March, 1942, * * * together with an appropriate description or identification of each such commodity."

Questions Presented.

The principal questions presented in this case are:

First. Whether the Circuit Court of Appeals was authorized to direct the District Court to enter a decree enjoining Petitioner "from selling, delivering, or offering for sale or delivery any candy bars at prices in excess of the highest prices *shown on its invoices and bills of lading* during March, 1942"; and

Second. Whether under Rule 52 (a) of the Rules of Civil Procedure for the District Courts of the United States adopted by the Supreme Court of the United States, the Circuit Court of Appeals was authorized to set aside findings of the District Court against Respondent with respect to the alleged violations of Sections 2 and 11 of General Maximum Price Regulation.

Third. Whether the Circuit Court of Appeals was authorized to find that: the use by the Trial Court of the Bureau certified weights was "clearly erroneous"; that the Trial Court should have used the invoices and accepted bills of lading weights; when, in fact, the *sole* basis for the invoice and bills of lading weights were the very Bureau certified weights which the Circuit Court had just condemned.

Fourth. Whether the Circuit Court of Appeals can properly grant relief upon a new theory which the Respondent neither plead, proved, nor relied upon on appeal.

Fifth. Whether the Circuit Court upon its own Motion can, on behalf of the Administrator of the Office of Price Administration, compel far reaching changes in industry, in violation of the provisions of the Emergency Price Control Act which specifically prohibits the compelling of such changes.

First Question.

As to the first of these five principal questions—we wish to first call the Court's attention to the variance between the decree directed to be issued and Section 2 of General Maximum Price Regulation. In order to do this, it is necessary that this Court understand what Petitioner's invoices and bills of lading for March, 1942, showed with respect to the highest price of Petitioner's candy bars.

The price in dollars and cents in March, 1942 was, in all cases, 68¢ per box of twenty-four bars, and there has been no variance in this price since the effective date of General Maximum Price Regulation.

The agreed shipping weight, which did not necessarily correspond with the actual shipping weight per carton, was also shown on these invoices and bills of lading. Petitioner had an agreement with the Western Weighing and Inspection Bureau, under the terms of which for the sake of convenience of Petitioner and the various railroads over which it shipped its candy bars, an average weight determination was made which did not necessarily represent the true weight of any particular carton of Petitioner's bars actually shipped (R. 264-5). In fact, the testimony with respect to the weight determinations showed that the invoice and bill of lading weights never corresponded exactly with any of the weights of the actual cartons used in arriving at the average weight determination (R. 292 to 330). Although the undisputed testimony showed that there was a change in the actual and average weights of Petitioner's candy bars and cartons thereof on March 23, 1942, this change in weight was not shown on invoices and bills of lading dated prior to April 1, 1942, in spite of the fact that there was actually a weight determination by the representative of the Western Weighing & Inspection Bureau on March 31, 1942 (R. 212, 246, 554, 596A).

Since weight and price are the only two possible variables on the invoices and bills of lading, and there has never been any contention that there has been any variation in the selling price shown thereon, it follows that the Decree must have reference to weight alone. And this, in spite of the fact that the undisputed testimony showed that there were variations in the ingredients and proportions thereof both in March, 1942, and during the period of the alleged violation (R. 208-212, 552-555).

Thus, while the direction of the Circuit Court of Appeals is not specific and clear, yet taken in context with the opinion of the Court, the apparent meaning of the direction is that the trial court shall issue a decree enjoining Petitioner from selling, delivering, or offering for sale or delivery any candy bars with weights less than the average weight shown on Petitioner's invoices and bills of lading during March, 1942 (R. 670).

Therefore, if any carton of Petitioner's candy bars sold after the effective date of the decree directed to be entered by the Circuit Court of Appeals, weighed less than the average weight of its cartons in March, 1942, as shown on its invoices and bills of lading during March, 1942, Petitioner would be in contempt of court. In other words, Petitioner, under the injunction, will be required to maintain a minimum weight at this time equal to the average weight in March, 1942. Since the undisputed testimony showed that there are uncontrollable variations in the weight of Petitioner's bars, boxes, and cartons thereof, this necessarily means that the average weight of Petitioner's bars and cartons thereof must be increased above the average weight of such bars and cartons thereof during March, 1942 (R. 238-241, 245-250). This variation amounted to from ¼ to ½ ounce per bar (R. 262). We submit that this ruling of the Circuit Court is manifestly erroneous, and that it was never the intention of Congress or of the Price Ad-

ministrator that Petitioner and others in the candy industry should be required to increase the weights of their candy bars above the March, 1942 base.

Respondent's pleading does not authorize the decree directed to be issued by the Circuit Court of Appeals. Respondent alleged that "defendant has increased the price of all commodities sold and delivered by it * * * in excess of the highest price charged therefor by defendant during the month of March, 1942" (R. 3); and prayed that defendant be enjoined "from directly or indirectly selling, delivering, or offering for sale or delivery any candy bar at prices in excess of those established by the General Maximum Price Regulation" (R. 3).

In other words, the injunction directed to be issued by the Circuit Court of Appeals is against sales in excess of an average price (manifestly less than the highest) whereas the injunction prayed for by Respondent was against sales in excess of the highest price charged.

In his prayer for injunction, the Respondent sought to restrain Petitioner from selling any candy bar at prices in excess of those established by the General Maximum Price Regulation. The prayer does not mention invoices nor bills of lading. The Circuit Court, without prayer or provocation, went outside of the pleadings to enlarge the relief sought, by its own motion, and ordered the enjoining of the Petitioner for selling any candy bars at prices in excess of those shown on its *invoices* and *bills of lading* during March, 1942.

Second Question.

As to the second principal question—the trial court found against Respondent on each of the two counts in the Bill of Complaint; or, in other words, found as to the First Count, that there had been no sales in excess of the highest price charged by Petitioner in March, 1942; and as to the

Second Count, that the statement showing the highest price which Petitioner charged for all commodities sold and delivered by it during March, 1942, was correct.

As to the first finding, the evidence offered by the Respondent was insufficient to form the basis of a finding of a price violation. The only evidence offered in this connection was (1) the so-called formula cost sheets, which Respondent and the Circuit Court of Appeals both admit were not of any evidentiary value (Respondent's Brief in Circuit Court at page 32, and Court's Opinion, R. 670); and (2) agreements as to average weights for convenience in shipping which admittedly did not show true weights nor take into consideration any other price controlling factor than weight.

On the other hand, Petitioner offered evidence as to the weights of individual bars in March, 1942, and of individual bars manufactured during the period of the alleged violation, and in every instance the bars manufactured during the period of the alleged violation were heavier than the bars manufactured during March, 1942 (R. 254, 583-590). In addition to this, Petitioner's uncontradicted testimony showed that more ingredients by weight per 24-bar box were used in the period of alleged violation, than during March, 1942 (207-214, 554, 555, 569A). In the face of this testimony, the Circuit Court of Appeals held that the findings of fact by the trial Judge were clearly wrong, and substituted its own findings, which were contrary to the undisputed testimony in the case.

Third Question.

As to the third principal question, it is apparent that in its desire to find justification for its decision, the Circuit Court fell into a pitfall of its own creation. The Circuit Court finds that the trial Judge's findings were "clearly erroneous" insofar as they are based upon the certified

weights (that is, Western Weighing and Inspection Bureau Agreement weights). That instead of using the Bureau weights, the trial Judge should have followed the "invoice and accepted bills of lading which showed the weights." Obviously the Circuit Court did not realize that the *sole* basis for the weights as shown upon the invoices and bills of lading that were introduced in evidence, were the Bureau weights.

This mistake which the Circuit Court made is clearly demonstrated by a review of the record. Such a review shows that the Bureau agreement weights had been the basis for the preparation of all invoices and rail shipments from the Mars, Incorporated plant at Chicago for many years (R. 191). In fact, the agreement with the Bureau had been in effect since September 15, 1929 (R. 346).

According to the testimony of a representative of that Bureau who was called by Respondent as a witness, the average weight as found by the Bureau is used by the shipper for billing purposes (R. 107). The Bureau subsequently checks the shipper's invoices, loading tallies and bills of lading to see that shipments have been made in accordance with the averages as established by the Bureau (R. 107). The Bureau agreements (R. 291 to 330) and the invoices in evidence (R. 348 to 498) bear this out.

Thus it is inescapable that weights as established by the Bureau are identical with weights as shown on invoices and bills of lading for practically all shipments from the factory at Chicago. How can the Circuit Court be authorized to say that using the weights shown on one for a finding of fact is clearly erroneous, while the weights shown on the other is "the evidence which should have been used?" (R. 670.) Incidentally, the Respondent rested his case in the trial Court and upon appeal on these very "determinations of weight by the Western Weighing and Inspec-

tion Bureau Certificates" which the Circuit Court so vigorously condemns (Respondent's Brief in Circuit Court Page 38).

[The Petitioner should not be understood as contending that the Bureau, invoice, and bills of lading weights were correct for the purpose of determining the selling price of the candy. To the contrary, the Petitioner has always contended that these weights were only rough averages used for convenience in shipping only. It is undisputed that the actual average weights run under and over the agreement weights (R. 265). The record shows that *all* bureau, invoice and bills of lading weights were incorrect when eleven separate carloads of candy were check-weighed (R. 194-198, 242-244, 259-261, 549.]

Fourth Question.

As to the fourth question, the record shows that the Respondent changed his theory of his right to the injunction during the pendency of the action. Respondent plead his case by naming the individual candy bars as the "commodity," by charging that all of the bars, of the same kind, manufactured in March contained exactly the same ingredients, and by asserting that all purchasers after May 11, 1942, received approximately 11% less candy than they received during the month of March (R. 1, 2). These allegations were all abandoned during the trial.

At the time of the trial in closing argument for Respondent, his counsel admitted that the bars were not all identical (R. 611). Respondent's counsel admitted that he had been unable to prove the charged 11% reduction by urging as "our concept in percentages" figures ranging from 5.1% to 6.3% (R. 617). During the trial the Respondent relied heavily upon the "cost sheets" (which he erroneously referred to as "formula" cost sheets). In fact, approximately twenty pages of testimony and more

than three hundred pages of exhibits in the record, were based principally upon these "cost sheets" (R. 152-164, 498-516).[1]

Upon appeal, these "cost sheets" were disowned and abandoned (Appellant's Brief in Circuit Court Page 32). Further, upon appeal to the Circuit Court, the Respondent abandoned his plead figure of 11%, and also abandoned his trial court figures of 5.1% to 6.3%. He offered a new set of figures as to his claimed reduction of from 2.61% to 12.84% (Appellant's Brief in the Circuit Court Page 14). Upon appeal no mention was made in Appellant's brief of "all bars of a kind in March containing exactly the same ingredients, and weighing exactly the same", nor of "the 11% reduction in all bars after May 12, 1942", as such.

The Circuit Court evidently realized that there could be no common ground found on which the Respondent's Pleadings, proof and appeal could be rationalized. Further, the Circuit Court seems to have realized that the relief as prayed for by Respondent could not be granted.

The Circuit Court abandoned the Appellant's evidence and brief in deciding that the Western Weighing and Inspection Bureau certificates were erroneous (R. 670). It had been upon these very certificates that the Respondent had sought to prevail (Appellant's brief in the Circuit Court Page 38 and R. 612). The Respondent considered the Bureau certificates and the invoice weights to be identical (R. 612). The Respondent did not place any dependence upon bills of lading as such (Appellant's Brief in Circuit Court Page 38).

The Circuit Court, after having abandoned the Respondent's pleadings and theory of attack in the trial and upon the appeal, substitutes a *new theory* of its own: to-wit,

---

[1] Exhibits concerning this abandoned plea have not been included in the Petitioner's designation of the record.

that the invoices and bills of lading prices as of March should be the foundation for the injunction.

In the closing lines of his brief on appeal, the Respondent asked that the trial Court be instructed to enter appropriate findings in accordance with the Respondent's proof, and sought a decree pursuant to the prayer in the Respondent's Complaint (Appellant's Brief in the Circuit Court Page 59). The Circuit Court granted no such relief. Instead, the Circuit Court entered an order upon an entirely new theory of its own; an order without justification in the Respondent's pleadings, evidence or brief.

Fifth Question.

The Emergency Price Control Act, Section 902, provides as follows:

> "(h) The powers granted in this section shall not be used or made to operate to compel changes in the business practices, cost practices or methods, or means or aids to distribution, established in any industry, except to prevent circumvention or evasion of any regulation, order, price schedule, or requirement under this Act."

Apparently the Circuit Court overlooked this provision in the Act when the opinion was written. Although the Court's attention was directed by the Appellee's Petition for Rehearing to the changes its opinion authorized the Administrator to compel in industry, nevertheless the Circuit Court denied rehearing (R. 687).

In the petition for rehearing, Petitioner set out in detail the five principal changes compelled in the Company's business practices by this decision. Changes (3) and (4) there are combined here, for brevity (R. 683 to 687). If Mars, Incorporated, has not been singled out and discriminated against, then apparently the entire piece and package goods industry has been compelled to make the same changes in business practices. At no time has the Respondent

ever claimed or contended that these changes were made to prevent circumvention or evasion of any regulation, order, price schedule or requirement under the Emergency Price Control Act. Therefore, it would seem that the compelling of such changes is unlawful. The four or five principal changes in the business practices in the industry of which Mars, Incorporated, is a part, are as follows:

(1) Under the *old* business practices, invoices were written up from one day to twenty days before shipment was made.

Under the *new* practice, as ordered by the Circuit Court, this would not be possible. (See lists and record references at R. 678, 683.)

(2) Under the *old* business practices, Mars, Incorporated, only attempted to manufacture candy bars to a weight tolerance of from ¼ to ½ ounce per bar, which amounted to from 10% to 20% (R. 262, 264, 684).

The Circuit Court has said "the only evidence as to a range of variance was that it might be 5% above or below the wrapper weight" (R. 661). The Circuit Court was wrong (R. 684). It confused evidence as to variations in shipping tolerances with evidence as to variations in individual bars; but right or wrong, under the *new* practice, apparently candy manufacturers are called upon to reduce the variations on individual bars from 20% to 5%, because the Circuit Court misunderstood the testimony (R. 262, 264, 684).

(3) (4) Under the *old* practices, five-cent candy bars were sold as individual bars, and on a count per box basis. Weight was not considered by the purchasers. The witnesses for Respondent so testified (R. 91, 113, 114). The Respondent recognized that the sale of five-cent candy bars was by individual bars upon a count per box basis in his official opinions and orders dealing with other candy bar sale (R. 623, 627, 630, 632, 634, 636, 638). In none of these

opinions or orders which concern competitive candy companies does the Respondent mention invoice or bills of lading shipping average weights.

Under the *new* practice as ordered by the Circuit Court, the candy industry, or at least Mars, Incorporated, is ordered to adopt a new method of selling its candy; that is, upon the basis of *average* shipping carton weights without regard to the count per box of individual bars (R. 670). Thus, there are two changes merged into one here. Under the *new* practice, candy is sold neither as individual bars, nor upon a count per box basis, but only upon *average* shipping weight in cartons.

(5) Under the *old* practice an estimated tolerance in shipping weight cartons of 5% was allowed by the railroads, in making freight charges (R. 264). This had nothing to do with the sale price of the candy, since the manufacturer paid the freight to destination, and the purchaser was interested only in the number of bars he received (R. 91, 114).

Under the *new* practice as prescribed by the Circuit Court, the average shipping weight in March has become the basis for all pricing in the future (R. 670). Since the Circuit Court apparently confused this 5% allowance on freight weights, with the normal manufacturing variations in individual candy bars, now it would seem that freight weight variables are no longer permitted. Now the *price* of the candy itself must conform to the *March average shipping weight*. Any deviation below is a violation of the Regulation, according to the Circuit Court Opinion. Surely an average can be safely maintained only by staying above it, if the slightest deviation is to be fatal. Since the March, 1942, invoice weights were based upon January 16, 1942, weighing agreement, the Circuit Court has said in effect that Mars must use its gross shipping weights to keep its prices *lower* than the *average* price on

January 16, 1943 (R. 686). This is a new interpretation of the General Maximum Price Regulation, and is quite different from the *highest* price in *March* which the Regulation specifies *(7 F. R. 3153)*.

The Circuit Court has ordered a complete change in business practice, which has the effect of calling upon the Petitioner to keep variable shipping weights at an average, but not to permit any of the cartons to fall below the average. This is *impossible*. If the Circuit Court is correct, the only alternative left to the Petitioner is *to keep all carton weights above the January 16, 1942, average shipping weight*, even though this means a complete change in the Petitioner's method of doing business.

Circuit Court Erred in Placing Burden of Proof On Petitioner.

The Circuit Court attempted to justify its findings on the most artificial reasoning we have ever witnessed. It reasoned that the Emergency Price Control authorized a price increase resulting from innocent manufacturing practices, and that Petitioner was attempting to justify an increase in price on account of innocent manufacturing practices, to-wit, uncontrollable variations in weight and changes in ingredients and proportions thereof occasioned by war time conditions, and upon these false assumptions held that Petitioner had the burden of bringing itself within the statutory exception.

In the first place, neither the Emergency Price Control Act of 1942 nor the General Maximum Price Regulation establishes weight, rather than ingredients, as the sole or even primary factor in determining the price of commodities such as Petitioner sells, and equally manifestly there are many other factors such as taste, quality, etc. So that it is not possible to say that weight is the rule, and nature of ingredients is the exception, created by the Emergency Price Control Act of 1942 and General Maximum Price

Regulation. It therefore does not follow that Petitioner had the burden of proving that the alleged weight reduction resulted from necessary ingredient changes.

In the second place, Petitioner *did* offer ample testimony to justify the Court in finding as he did, that there had been no increase in price, if it be assumed that Petitioner here had the burden of proof on that issue (R. 142, 234).

In the third place, the only authorization in the Emergency Price Control Act of 1942 or General Maximum Price Regulation for a price increase above the March 1942 ceiling is by a specific adjustment of prices upon application. Any testimony which was or could have been offered by Petitioner in regard to manufacturing tolerances, change of ingredients, etc., would have been pertinent only insofar as such testimony showed that no price increase resulted therefrom, not as stated by the Circuit Court of Appeals, as bringing it within the exception of an authorized increase in price.

The Circuit Court erred in holding that the trial court was clearly wrong in holding that there was no proof of violation of Section 11 of General Maximum Price Regulation. In Petitioner's operations, practically all of the candy manufactured in any given day was shipped on that day. The testimony showed that there had been a reduction of weight in the candy bars on March 23, 1942, although what this average reduction amounted to was not determined until March 31, 1942—so that during the last eight days of March, 1942, Petitioner in the usual course of its business was shipping out of its plant every day approximately 3,000,000 candy bars at the reduced weight, in spite of the fact that the agreed shipping weight shown on the bills of lading and invoices had not been changed since the January determination (R. 212, 403, 554, 555).

Furthermore, the testimony showed that the very cartons used by the representative of the Western Weighing and

Inspection Bureau in making the weight determination on March 31, 1942, were placed in a box car and shipped out that day (R. 111, 188).

In spite of this testimony, the Circuit Court of Appeals held that the trial court was clearly wrong in his finding that there had been no showing of failure by Petitioner to comply with Section 11 of General Maximum Price Regulation (R. 670).

Instead of using this testimony, the Circuit Court of Appeals chose to disregard it and instead said that possibly the cartons of candy which were used in making the weight determination on March 31, 1942, and which were placed in a box car and shipped out that day, might have gone to one of Petitioner's warehouses—and this, in spite of the fact that there was not one iota of testimony in the record that Petitioner owned any warehouses, or was shipping any candy to warehouses owned by it in March, 1942—and chose to hold that the trial court's finding was clearly wrong upon the basis of a remote possibility which was based entirely on a false and unfounded premise (R. 668, 670).

We must confess that it is difficult for us to conceive of a fair, impartial tribunal's indulging in flights of fancy in order to set aside as "clearly erroneous" the findings of a trial Judge who carefully considered all the testimony in the case, who had an opportunity to judge of the credibility of the witnesses, and who based his findings upon the undisputed evidence.

Statement.

Mars, Incorporated has for a number of years manufactured six flavors of candy in the form of six distinctly named five-cent candy bars designated as:

Milky Way
Snickers

Three Musketeers
Forever Yours
Mars
Dr. I. Q.

This candy is made by a continuous process of manufacture, rather than by the usual "batch" method. As the candy progresses from its initial stage of simple sugar sirup to the various completed flavors, certain ingredient changes are made and ingredients are added to make the distinctive character of each of the six kinds of candy. (R. 131). This candy has always been sold as individual bars upon a "count per box" basis. (R. 12, 91, 114, 226, 228, 557). Since the individual bars in each flavor vary from ¼ to ½ ounce per bar in normal manufacturing practice, the average net weight of the candy bars was always slightly more than the average net weight as designated upon the wrappers. (R. 262). This is in keeping with customary practice in the candy bar industry. (R. 255, 256, 591).

In March of 1942, the six candy bars as manufactured by Mars carried the following wrapper weight designations, but the actual average weight of the bars of each of the six flavors, was slightly in excess of the weight shown:

Candy Bar Name	*Wrapper Weight Designations*
Milky Way	2½ ounces
Snickers	2½ ounces
Forever Yours	2½ ounces
Mars	1⅝ ounces
Three Musketeers	2½ ounces
Dr. I. Q.	1¾ ounces (R. 347)

When the General Maximum Price Regulation was promulgated by the Price Administrator, of the Office of Price

Administration on April 28, 1942, Mars, Incorporated had permitted its average weights to fall below those in use in March of 1942. On May 11, 1942, the effective date of the Regulation, Mars, Incorporated, increased its average weights to a level greater than its wrapper weight designation had been in March and continued to produce its six flavors at average weights in excess of the March wrapper weight designation for the entire period under consideration, that is, from May 11, 1942 until December 15, 1942. (R. 205, 236, 551, 552, 577).

The Plaintiff below, Respondent here, made no attempt to prove that there had been a reduction below the wrapper weight designation in March, 1942. The complaint was based upon two counts:

(1) That all of the bars of candy of the same kind, and boxes and cartons thereof, sold and delivered by the Defendant contained exactly the same ingredients and were exactly the same size and weight during each and every day of the entire month of March, 1942. That on and after May 11, 1942, each and every candy bar manufactured, sold and delivered was materially reduced in size and weight, and as a result thereof, all purchasers of said candy bars, and boxes and cartons thereof, have received since May 11, 1942, approximately 11% less candy than they received during the month of March, 1942. (R. 2).

(2) That Defendant failed to prepare a true and correct statement showing the highest price it charged for its commodities delivered or supplied during March, 1942. (R. 2).

Upon these two counts, Plaintiff sought to enjoin the Defendant from selling candy bars at prices in excess of those established by the General Maximum Price Regulation. (R. 2-3).

During the trial, the greatest dispute arose over whether the weights determined on March 31, 1942 should be the

basis for determination of the March price. The Respondent contended that five-cent candy bars were sold by gross shipping weight in cartons, and that any reduction below the average shipping weight in March, 1942 was illegal. (R. 1-4, 47-80, 599-611). A weight determination was made on March 31, 1942, showing an average reduction of two pounds per carton of 288 candy bars. (R. 601, 602). This amounts to a reduction of only approximately 1/10 of an ounce per candy bar. This *entire litigation centers on that 1/10* of an ounce per bar. Even though the lower weight candy was weighed, loaded in the cars, and shipped on March 31, since the Company did not begin using the lower weights for invoice purposes until April 1, the Office of Price Administration has instituted this litigation. In his opening statement Respondent's Counsel admitted the suit would not have been brought had the Respondent known that the Petitioner could prove that it had shipped under the lower agreement weights in March. (R. 36). Not only did the Petitioner prove that it had shipped the actual candy weighed on March 31, 1942 on that day, but it also proved that all candy manufactured and sold from March 23, 1942 through March 31, 1942 had been at the lower average weights. (R. 111, 185-188, 212-214, 246, 554-555, 596A).

The Respondent's principal investigator, one R. J. Reiser, spent thirty-seven days investigating, in an attempt to prove this alleged 1/10 of an ounce reduction in weight. (R. 92). Yet when he was confronted with bars made at the old and alleged new weights, the variations, if any, were so infinitesimal, he could not say which were the light weight bars nor which the heavier bars, although he had only twelve from which to choose. (R. 99; Defendant's physical exhibit, which was marked Defendant's Exhibit 2).

Plaintiff's proof was predicated upon shipping averages for cartons of 288 bars each as these weights were determined by the Western Weighing and Inspection Bureau,

and by the invoices and bills of lading used in shipping the candy. (R. 68-79, 598-609). Plaintiff did not attempt to prove any actual weights of any individual bars, boxes nor cartons. (R. 91, 148, 164). All of the evidence offered by the Plaintiff was upon average shipping weights, without regard to any actual individual bar, box or carton weights. (R. 91-92, 101).

The Defendant below, Petitioner here, responded by pleading and proving that:

(1) The sale price of its commodity had never been increased. (R. 142, 232).

(2) That Mars, Incorporated was selling individual candy bars at the weight designated on the wrapper, which bars were packed in boxes and cartons for convenience, and which individual bars were sold on a count per box basis. (R. 12, 91, 114, 226, 228, 557).

(3) That all candy bars sold and delivered after May 11, 1942 were of greater average weight than the wrapper weight designation used in March, 1942. (R. 205, 236, 550, 551, 577).

(4) That individual candy bars manufactured after March weighed more than those manufactured in March, 1942. (R. 254, 583-588).

(5) That constant ingredient changes made necessary by war time shortages caused uncontrollable variations in individual bars and general averages. (R. 238-240, 244-250, 582).

(6) That Mars, Incorporated, actually used more ingredients by weight per twenty-four bars, from May to December, 1942, than it had used in March of 1942. (R. 212, 552, 555, 596A).

(7) That it is taste, not weight, which is the determining factor in the sale of candy, and thus that gross carton ship-

ping weights were not a proper basis for determining the selling price of this commodity. (R. 26, 234, 262, 576, 580).

In response to the evidence offered by the Respondent in support of his two counts, the Petitioner proved:

(1) That the average shipping weight upon which the Plaintiff based his case were mere rough averages and were inaccurate. (R. 259-260, 292-511, 549).

(2) That when these average shipping weights were considered on a fair basis, that the reduction shown by even these inaccurate averages, amounted to only 86/100 of 1% instead of 11% as plead by Plaintiff, and apparently as found by the Circuit Court. (R. 203-207, 550, 235-236, 577.)

(3) That the "ceiling price statement" showed the accurate information required by the Regulation. (R. 111, 221).

The Petitioner raised no question as to constitutionality of the Statute involved (*50 U.S.C.A. Appendix Sec. 901*) nor the validity of the regulation (*7 Fed. Reg. 3153*). The Petitioner has made no assault upon the Office of Price Administration nor upon its price program. The Petitioner has confined itself to defense against the charges brought against it.

The Respondent has sought to make this case appear as a fight between the Government and "business" for determination of the validity of the price control program. (See opening paragraph of Plaintiff's "Extension of Oral Argument," filed with the trial Court). Nothing could be farther from the truth. Actually, the Petitioner here has never attacked the Act nor the Regulation. The Petitioner has merely consistently insisted that it has not violated the Act nor the Regulation.

During the trial the Respondent abandoned his pleadings and confessed that he was unable to prove count 1, the fundamental premise upon which his cause was based. (R. 613). Since count 2 was founded upon count 1, when the first count fell, so did the second.

The District Court found that there had been no increase in price within the meaning of the Regulation of April 28, 1942.

The Circuit Court found, in effect, that when the General Maximum Price Regulation *stated:*

> "* * * the highest price charged by a seller during March 1942 shall be:
>
> (1) The *highest price* * * * charged for a commodity *delivered* * * * by him during March 1942." (*7 Fed. Reg. 5153*)

that the Regulation actually *means:*

> "the highest price charged by a seller during March 1942 shall be:
>
> (1) The *average shipping weight* for a commodity *invoiced* by him during March, 1942." (Italics ours) (R. 670-671)

The Circuit Court granted relief which the Plaintiff had not sought in his pleadings. There was no evidence to show that such relief as was granted was either desired by the Administrator or was justified under the facts. The relief granted was wholly original with the Circuit Court since it had not been sought nor suggested by pleadings nor evidence.

The Circuit Court's ruling changed the General Maximum Price Regulation to the General Average Weight Regulation. By judicial decree, the regulation has been enlarged beyond its original scope, and the statute which authorized this Regulation has been violated.

Specification of Errors to Be Urged.

The Circuit Court of Appeals erred:

(1)

In holding that the trial court was clearly wrong in finding that Petitioner had not sold its candy bars in excess of the highest price charged therefor by it in March, 1942, as alleged by Respondent.

(2)

In holding that the trial court was clearly wrong in finding that Petitioner had not failed to prepare a statement as required by Section 11 of General Maximum Price Regulation.

(3)

In holding that the burden of proof was upon Petitioner to prove that it had not sold any of its candy bars at prices in excess of the highest price charged therefor by Petitioner in March, 1942.

(4)

In holding that Petitioner had not proven by competent testimony that it had not sold any of its candy bars at prices in excess of those charged by it for same in March, 1942.

(5)

In holding that the burden was upon Petitioner to prove that it had prepared a correct statement as required by Section 11 of General Maximum Price Regulation.

(6)

In holding that Petitioner had not proven by competent testimony that it had prepared a correct statement as required by Section 11 of General Maximum Price Regulation.

(7)

In holding that the trial court was clearly erroneous in its findings of fact.

(8)

In holding that the trial court erred in dismissing Respondent's Bill of Complaint.

(9)

In holding that the trial court should have issued an Injunction as prayed for by Respondent.

(10)

In reversing the judgment of the Trial Court.

(11)

In directing the trial Court to set aside the order of dismissal of Respondent's Bill of Complaint.

(12)

In directing the trial court to enter a decree enjoining Petitioner, its officers, agents, and employees from selling, delivering, or offering for sale or delivery any candy bars at prices in excess of the highest prices shown on its invoices and bills of lading during March, 1942, and commanding the making of a statement of such highest March prices and maintenance of the same for inspection under the Regulation providing therefor.

(13)

In directing the issuance of a decree not authorized by the Emergency Price Control Act of 1942, nor by the General Maximum Price Regulation issued thereunder.

(14)

In directing the issuance of a decree not authorized by the Respondent's pleadings.

(15)

In holding that the highest price charged in March, 1942, for commodities sold by Petitioner should be determined upon the average weights of such commodities, instead of the lowest weight thereof.

(16)

In holding that the manufacturer's tolerance on Petitioner's candy bars is only 5%.

(17)

In holding that the lowest weight of any candy bar manufactured by Petitioner after May 11, 1942, must equal the average weight of such candy bar manufactured by it in March, 1942.

(18)

In holding that the trial Judge's finding of fact based upon the Western Weighing and Inspection Bureau agreement weights was clearly erroneous; that the evidence which should have been used was the invoices and bills of lading.

(19)

In holding that it could substitute a new theory of its own as the basis for the Injunction, in lieu of the Plaintiff's pleadings, proof and grounds on appeal.

(20)

In holding, in effect, that the Circuit Court has authority to authorize the Administrator of the Office of Price Administration to order changes in business practices in industry,

even though the Statute under consideration specifically prohibited the Administrator from compelling such changes in business practices.

Reasons for Granting the Writ.

I

This case is one of unusual magnitude and of great public importance. This is particularly true on account of the departure from the General Maximum Price Regulation made by the decision of the Circuit Court of Appeals when it, in effect, held that the *average shipping weight,* rather than the *highest price* charged in March, 1942, is the correct basis for determining the ceiling price. This is an important question of Federal law, which has not been, but should be settled by this Court.

II

In holding that the burden of proof was upon Petitioner to prove its innocence of the charges made against it, the Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

III

In directing the trial court to issue an injunction neither authorized by the General Maximum Price Regulation upon which the suit is based, nor by the pleadings in the case, the Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

IV

In holding that Petitioner must use the same ingredients and proportions thereof as were used by it in March, 1942, in spite of the fact that Respondent neither alleged nor

offered testimony that there was anything objectionable about the changes in ingredients and proportions thereof, although such facts were fully known to it, and in spite of the further fact that such ingredient changes and changes in proportions of ingredients were necessitated by war time conditions, the Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

V

In holding that by sanction of a decision in the Circuit Court the Administrator of the Office of Price Administration can make violent and far-reaching changes in the business practices of industry, the Circuit Court has permitted an act which the Emergency Price Control Act specifically prohibited. As to whether the Circuit Court was authorized to take such action, is an important question of Federal law, which has not been, and should be settled by this Court.

Conclusion.

It is respectfully submitted that this petition for writ of certiorari should be granted.

CLAUDE R. MILLER,
Palmolive Building,
Chicago, Illinois;
ROBERT B. HOLLAND,
Gulf States Building,
Dallas, Texas;
LEO B. PARKER,
Waltower Building,
Kansas City, Missouri,
Counsel for Petitioner.

Of Counsel,
STRASBURGER, PRICE, HOLLAND,
KELTON & MILLER.